Supreme Court, U. S.
FILED
MAY 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1432

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

versus

HECTOR MARTINEZ & CO.,
Respondent.

REPLY OF RESPONDENT, HECTOR MARTINEZ & CO., TO PETITION FOR A WRIT OF CERTIORARI

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May 13, 1980

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RESPONDENT'S BRIEF IN OPPOSITION

ISSUE PRESENTED

Did Respondent properly allege a cause of action pursuant to the provisions of 49 U.S.C. Sec. 20(11) for damages predicated upon the loss of use (rental value)

of machinery which has been unreasonably delayed in transportation by the carrier, without further allegations of notice to the carrier at time of shipment that such damages would accrue.

STATEMENT OF THE CASE

Respondent sued Petitioner for damages for the delay in transportation of five carloads of machinery (a single drag line). Said transportation being by rail common carriers with Petitioner being the delivering carrier. The shipment was tendered to the origin carrier on or about February 11, 1974 and the last of the five cars arrived in Eagle Pass, Texas (the destination in the bill of lading) on April 2, 1974. Respondent filed its claim in writing as required by the bill of lading contract within the time allowed. Said claim was for the loss of use (rental value) of the machinery.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent seeks to recover damages for the loss of use of valuable machinery unreasonably delayed in transportation. Respondent has alleged in its Original Complaint that the machinery was tendered to the carriers on or about the 11th day of February, 1974, at New Philadelphia, Ohio for transport to Eagle Pass, Texas, that the entire shipment consisted of one dragline loaded on five rail cars, routed in connection with Petitioner, and were not delivered at Eagle Pass, Texas until April 2, 1974. Respondent alleges that such in-

ordinate time in transportation amounts to unreasonable delay. No evidence has been offered or admitted into evidence in this cause and the allegations of Respondent's Original Complaint are to be accepted as true for the purposes of this proceeding, although not admitted by Petitioner.

The only issue between the parties is the right of Respondent to recover for damages predicated upon the loss of use (rental value) of the machinery because of the unreasonable delay in transportation. It is Respondent's contention that such damages are ordinary damages flowing from such delay, that the very nature of the shipment, as declared in the Bill of Lading, to wit: "Used Strip Mining Machinery and Parts", was such as to put the carrier on notice that damages would accrue for such delay. Petitioner contends that such damages are special in nature and not recoverable without the carriers having been given notice at the time of shipment that such damages could accrue. Therefore, the question is, in the case of valuable machinery delayed in transportation, are damages predicated upon the loss of use (rental value) those that naturally flow from the delay in transportation, and compensatory in nature, or are such damages *special damages*.

Respondent's rights herein are governed by 49 U.S.C. Sec. 20(11) denominated as the Carmack Amendment. Therein it is provided that any common carrier subject to the provisions of the Interstate Com-

merce Act who receives property for transportation in interstate commerce shall be liable to the party entitled to recover

> ". . . for the full actual loss, damage or injury to such property caused by it or by any such common carrier. . ."

and further

> ". . . That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law;"

Thus the Carmack Amendment incorporated common law rights along with the additional rights given to the parties by the statute.

The Carmack Amendment was enacted on June 29, 1906 and has been in force for over seventy years.

The United States Court of Appeals for the Fifth Circuit has ruled that Respondent is entitled to claim loss of use (rental value) as a measure of damages for unreasonable delay in transportation of machinery without further allegations of notice to the carrier at time of shipment that such damages would accrue.

REASONS WHY THIS WRIT SHOULD BE DENIED

13 C.J.S. Sec. 223 at p. 446 states the rule as to machinery that is unreasonably delayed by the carrier:

> "Machinery and implements. The measure of damages for unreasonable delay in transportation of machinery, *in the absence of notice of special damages,* is its rental value during the time it is improperly delayed, or in other words, the value of its use to the owner; and to this may be added such reasonable expense as may be incurred by the shipper in making a search for the goods in endeavoring to secure delivery. It is said that a loss of the use of machinery during the time delivery was delayed is the natural and proximate result flowing from the delay. . ."
> (Emphasis supplied)

In a case involving delay of a complete cotton gin outfit shipped from a point in Louisiana to a point in Alabama the Court of Appeals of Alabama held as follows:

> "In the instant case, the plaintiff is admittedly entitled to recover from the defendant for a breach of duty, but by reason of the fact that at the time of the shipment, the defendant did not have notice either by direct information or by being in possession of facts and circumstances which would have put it on notice, the plaintiff cannot recover for lost profits or for lost business, or things of that kind, but the defendant had notice of the kind and character of the shipment, and the plaintiff is en-

titled to compensatory damages for the delay, if it can be proven. The rule laid down in cases of this kind, as stated in Ruling Case Law, is:

> 'The usual compensatory damages recoverable for failure promptly to deliver machinery is the value of the use of the machinery during the delay — i.e., its rental value.' 4 R.C.L. 939"

Brothers v. Illinois Cent. R. Co., 77 Sou. 423 (424).

Cited and quoted in the *Brothers* case, supra, is the holding of the Supreme Court of Illinois in 1861 wherein that Court stated:

> "The proposition cannot be entertained for a moment that under a contract to deliver, in a reasonable time, valuable machinery, such as described in the declaration, that the difference in the market value of such machinery, at the time it was in fact delivered, and when it should have been delivered, is all the damage the owner of the machinery is entitled to claim. If this was the measure, there would be no great incentive to carriers to perform promptly a contract for the delivery of such articles as they are not liable to deteriorate in a few days or months. . .
>
> In this case, the inquiry should have been, What was the value of the use of such machinery in such a factory, for the time it was detained? *For what sum could plaintiffs have hired equal machinery of that description?*" (Emphasis supplied)

Priestly v. The Northern Indiana and Chicago R.R. Co., 26 Ill. 205.

Further support for the proposition herein urged by Respondent, that is, that the proper measure of damages for delay in transportation of valuable machinery, is the value of the use of the machinery, i.e. its rental value during the time of the delay is found in the following cases:

Missouri, O. & G. Ry. Co. v. Hazlett & Price, 128 P. 105 Supreme Court of Oklahoma; *Texas & P. Ry. Co. v. Hassell*, 58 S.W. 54, C.A. of Texas.

It should be carefully noted that each of the cases cited herein by Respondent are instances wherein machinery was delayed in transportation *and* no notice given to the carrier as to the result that would occur as a result of the delay.

Other cases involving the same measure of damages for delay are *New Orleans & N.E. R. Co. v. J. H. Miner Saw Mfg. Co.*, 1918, 78 Sou. 577, and *McCabe v. Chicago & N.W. Ry. Co.*, 1919, 215 Ill. App. 99. Both cases are annotated under Note 1035 to 49 U.S.C. Sec. 20(11).

Respondent is not seeking lost profits, or other itemized expenses, such as idle labor or penalties for failure to perform according to contract, which would be special damages. Respondent is only seeking the compensatory damages it is entitled to by reason of the delay. Respondent expects to be required to prove the value of the use of the machinery, that is, its rental value, on trial of this case, but it has stated a cause of action and is entitled to go forward with such proof that it may have at the time of trial.

THE CASES CITED BY PETITIONER ARE NOT IN POINT

Petitioner cites *Texas Instruments, Inc. v. Branch Motor Express Company,* 308 F.Supp. 1228 (D. Mass. 1970) aff'd 432 F.2d 564 (1st Cir. 1970) as support for the proposition that the damages sought by Respondent were in the nature of "Special Damages".

Respondent would point out to this Honorable Court that the *Texas Instruments, Inc.* case, supra, is distinguishable from the claim of Respondent. In that case, the plaintiff was the consignee of a highly sophisticated drill machine worth some $20,000.00. The machine was *totally* destroyed during transportation. Plaintiff not only sued for the value of the machine but also sought to recover such items of special damages as extra wages paid to employees performing the function of the machine while a replacement was procured, and also the lost profits plaintiff would have realized

from the increased output of the machine. The Court awarded the difference in market value of the machine before and after it was damaged, this being the correct measure of damages where the property is totally destroyed. (See *Cogbill v. Martin,* 308 S.W.2d 269, Tex. C.A. 1957). Syl. 2, "When chattel is totally destroyed measure of damages is difference in market value." The holding in the *Texas Instruments* case is almost exactly the same as the *Brothers* case, supra. There the Court did not allow recovery of expected profits either, but only the value of the use of the machine, that is its rental value. Special damages sought including profit as in the *Texas Instruments* case were denied in both cases. The holding in both cases is correct. The difference is the measure of damages sought and the fact that the *Texas Instruments* case did not involve delay in transportation as did the *Brothers* case.

INTEREST VALUE

The Fifth Circuit in its opinion has stated

> "Capital good such as machinery have a use value, which may equal the rental value of the equipment or may be an interest value. The latter is ordinarily interest at the market rate on the value of the machine."

Hector Martinez & Co. v. Southern Pacific Transportation Co., 606 Fed.2d 106 (109) Fifth Circuit 1979.

See also *The New York and Colorado Mining Syndicate and Company v. David R. Fraser et al*, 130 U.S. 611, 1889 Syl. 6 and at p. 622, 623.

CONCLUSION

Respondent relies on the decision of the Fifth Circuit and cases cited herein. (Though some of the cases be ancient but venerable.)

Petitioner's contentions being untenable, the petition should be denied.

PREMISES CONSIDERED, Respondent, Hector Martinez & Co., prays that the Petition be in all things denied.

Respectfully submitted,

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4627 North Central Expressway
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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the within and foregoing reply has been served on Petitioner by depositing three copies of the same in the United States mail, postage prepaid, addressed to:

Mr. Howard P. Newton
Attorney for Petitioner
15th Floor
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San Antonio, Texas 78205

Dated this ____ day of May, 1980.

PAUL J. CHITWOOD